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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1184

CHOCTAW COUNTY BOARD OF EDUCATION,
Petitioner,

v.

VIRGINIA COLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement of the case	3
Reasons for granting the writ	6
The decision of the Court of Appeals is in conflict with the decisions of this court	6
I. The Court of Appeals Has Without Authority Extended Wrongfully the First Amendment Freedoms of Teachers to Non-Tenured Bus Drivers	6
II. The Court of Appeals Has Held That Actively Supporting a School Boycott Is a First Amendment Freedom of a Bus Driver	9
III. The Court of Appeals Has Held That Discussion of Segregation Within the School With the FBI Is a First Amendment Freedom of a Bus Driver	11
IV. The Court of Appeals Has Held That in Equity a School Board Is a "Person" Within the Meaning of 42 U.S.C. § 1983, and Therefore Can Be Sued for Torts of Agents Under Respondeat Superior Notwithstanding the State Rule to the Contrary	14

V. The Court of Appeals May Not Deny Full Review to Decisions of the District Court Which Strike Down State Action in the Rehiring of Non-Tenured School Bus Drivers .. 18

Conclusion 20

Appendix A—Opinion of U.S. Court of Appeals for the Fifth Circuit A-1

Appendix B—Judgment of U.S. Court of Appeals for the Fifth Circuit A-5

Cases Cited

Ahern v. Board of Education, 327 F. Supp. 1391 (Nebr. D. C. 1971), aff'd. 456 F. 2d 399 (C.A. 8th 1972)...13, 19

Avins v. Mangum, 450 F. 2d 932 (C.A. 2nd, 1971) 16

Baker v. Washington, 448 F. 2d 1200 (C.A. D.C. 1971) 16

Carter v. Carlson, 447 F. 2d 358 (C.A. D.C. 1971), 34 L. ed. 2d 613 (1973) 16

Cobb v. City of Malden, 202 F. 2d 701 (C.A. 1st, 1953) 17

Cooley v. Board of Education, 453 F. 2d 282 (C.A. 8th 1972) 19

Corbean v. Xenia City Board of Education, 366 F. 2d 480 (C.A. 6th, 1966), cert. den. 385 U. S. 1041 16

Cox v. Louisiana, 379 U.S. 536 (1965) 12

Dunn v. Tyler Independent School District, 460 F. 2d 460 (C.A. 5th 1972) 10

Garrity v. New Jersey, 385 U.S. 493 (1967) 8

Ginsberg v. New York, 390 U.S. 629 (1968) 12

Goldwasser v. Brown, 417 F. 2d 1169 (C.A. D.C. 1969), cert. den. 397 U.S. 922 13

Harkless v. Sweeny Independent School District, 427 F. 2d 319 (1970) 16

Hawkins v. State Board of Adjustment, 242 Ala. 547, 7 So. 2d 775 (1942) 14
Healy v. James, — U. S. —, 33 L. ed. 2d 266 (1972) 8, 10, 12
Jones v. Hopper, 410 F. 2d 1323 (C.A. 10th 1969), cert. den. 397 U.S. 991 13
Keyishian v. Board of Regents, 385 U.S. 589 (1967) .. 7
Monroe v. Pape, 365 U. S. 167 (1961) 15, 16
Moor v. Madigan, 458 F. 2d 1217 (C.A. 9th, 1972) 16
Moore v. Winfield Board of Education, 452 F.2d 726 (C.A. 5th 1971) 13
Pickering v. Board of Education, 391 U.S. 563 (1968) 6, 9, 10, 11, 12
Roberts v. Williams, 456 F. 2d 819 (C.A. 5th, 1971)..16, 17
Shelton v. Tucker, 364 U.S. 479 (1960) 7
Siegel v. Regents of U. of Cal., 308 F. Supp. 832 (Cal. D.C. 1971), Vac. 449 F. 2d 788 (C.A. 9th 1971) 13
State v. Kolb, 201 Ala. 439, 78 So. 817 (1918) 15
Tipton v. Board of Education, 276 Ala. 571, 165 So. 2d 120 (1964) 17
Tinker v. Des Moines Community School District, 393 U.S. 503 (1969) 8, 11
Turk v. County Board of Education, 222 Ala. 176, 131 So. 436 (1930) 14
Wieman v. Updegraff, 344 U.S. 183 (1952) 7
Yumich v. Colter, 452 F. 2d 59 (C.A. 7th, 1971) 15, 16

Statutes Cited

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343 3
42 U.S.C. § 1981 3
42 U.S.C. § 1983 .....2, 3, 14, 15, 16, 17

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

The Petitioner, Choctaw County Board of Education, prays that a Writ of Certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 5, 1973.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The District Court for the Southern District of Alabama did not render an opinion as such, and none was reported. The Findings

of Fact and Conclusions of Law of the District Court was adopted by the Court of Appeals as its opinion, and it is set out in the Appendix hereto, noted above.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 5, 1973, and this Petition for a Writ of Certiorari is being filed within Ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Are First Amendment Freedoms granted public school teachers, and for the exercise of which they must be rehired, to be extended to non-tenured school bus drivers?

2. Is the right to support actively a boycott of the public school system a First Amendment Freedom for the exercise of which a non-tenured bus driver must be rehired?

3. Is the right to discuss racial segregation in the public schools with the FBI a First Amendment Freedom for the exercise of which a non-tenured bus driver must be rehired?

4. Is a School Board in the Equity Court a "Person" within the meaning of 42 U.S.C. § 1983, which can be sued for the wrongs of agents under respondeat superior notwithstanding a State rule prohibiting respondeat superior in such cases?

5. May a Court of Appeals deny full review of the acts of the District Court which overturn personnel decisions by elected members of a School Board?

STATEMENT OF THE CASE

Plaintiff a non-tenured bus driver for Defendant, Choctaw County Board of Education, was not rehired for the school year 1968-69. The practice was for the Transportation Supervisor in the system to recommend bus drivers to the Superintendent of Education, whose recommendation to the School Board was ordinarily approved. The recommendation not to rehire in this case was accepted by the Board. When Plaintiff was not rehired, she inquired of the Supervisor why she had not been rehired. She testified:

> "He said I had been talking to some FBI's and I had tried to boycott the principal."

Without seeking any review before either the Superintendent or the School Board of the failure of the Supervisor to rehire her, this suit was filed in the United States District Court for the Southern District of Alabama under Title 28 U.S.C. § 1343 (3) and (4), 42 U.S.C. §§ 1981, 1983, seeking judicial review of this action of the Transportation Supervisor. Her Complaint alleged that she was not rehired because

> "(1) She had been connected with the boycott [of the schools] of 1967,
>
> (2) She had been connected with a Mr. William Harrison in trying to get rid of the principal, Alphonso Marsh, of East Choctaw High School, a Negro school.
>
> (3) Because of her close association with and relationship to a Mrs. Yvonne Hampton and Willie Jean Hampton."

Only by a very liberal construction of the pleadings can it be said that it is even alleged that these acts constitute First Amendment Freedoms.

On the trial of this case, the testimony was in conflict with the pleadings, for the sole and only evidence in this case that the failure to rehire was for constitutionally impermissible reasons was that quoted above, namely:

> "He said I had been talking to some FBI's and I had tried to boycott the principal."

Neither the School Board nor the Superintendent had any information about this case, nor were they given an opportunity to review, investigate or rectify any part of this transaction. Instead, they were jerked into court to justify the actions of a Transportation Supervisor who was no longer with the system.

The Transportation Supervisor gave **five** [not four, as stated in the Findings of Fact by the District Judge] reasons for not rehiring the driver, with Exhibits admitted in evidence to substantiate the reasons. He unequivocally denied that boycotts or talking had anything to do with her not being rehired. The District Judge, however, convicted the Supervisor of lying, and accepted at its face value the testimony of the driver, and added to it to fix the **real** reasons the Supervisor failed to rehire. The trial court found as facts:

> "The Court finds that Mrs. Cole was discharged [sic] because she discussed racial segregation in Choctaw County Schools with the FBI and she had actively supported the 1967 school boycott."

There is not a scintilla of evidence in the Record in this case that the bus driver was accused of or actually discussed "racial segregation" in or outside Choctaw County Schools or any other schools, with the FBI, or anyone else.

There is not a scintilla of evidence in the Record in this case that the bus driver

(1) was not rehired for boycotting the school system or

(2) was told that this was why she was not rehired.

In fact, bus driver denied even knowing what the boycott was about.

A panel of the Court of Appeals, concluding *sua sponte* under Local Rule 18, that this appeal of this reversal of the employment action of the elected public school officials in Choctaw County, Alabama, was not worthy of full judicial review, transferred this appeal to its Summary Calendar, and forthwith affirmed the decision of the trial court on January 5, 1973, without argument or written opinion.

This Local Rule 18 is:

"Rule 18. Summary Calendar

(a) Whenever the court sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court.

The Court of Appeals has misconstrued, misapplied, or misconceived the decision and Opinion of this Court in the case of **Pickering v. Board of Education,** 391 U.S. 563 (1968) in applying it to the case of a non-tenured bus driver. If allowed to stand, the decision in this case will open up the employment of janitors, maids, yard help, and the like in public schools to regulation by the Federal Courts and completely cripple the elected school officials in their attempts to operate the school systems.

I

The court of appeals has without authority extended wrongfully the first amendment freedoms of teachers to non-tenured bus drivers.

Conceding *arguendo,* that discussing racial segregation in Choctaw County Schools with the FBI, and active support of a school boycott, constitute First Amendment Freedoms which when exercised by school teachers cannot be used by a School Board not to rehire a teacher under **Pickering v. Board of Education,** 391 U.S. 563 (1968), the question here is whether or not these First Amendment Freedoms are the same for school bus drivers. The District Court and Court of Appeals held that these rights were the same for school bus drivers as for school teachers. No authorities were cited for this. We have found no such authorities. Certainly **Pickering** is no such holding. In fact, we read it as being limited to school teachers.

The desirability and necessity for the broadest protection of teachers in exercising First Amendment Free-

doms was set out in the concurring opinion by Justice Frankfurter in **Wieman v. Updegraff**, 344 U.S. 183, 195 (1952):

> "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

This special protection for teachers was recognized in **Shelton v. Tucker**, 364 U.S. 479, 487 (1960):

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

This was further spelled out in **Keyishian v. Board of Regents**, 385 U.S. 589, 603 (1967):

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom. * * * The classroom is peculiarly the 'marketplace of ideas'. The

> Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather], than through any kind of authoritative selection.' "

This was summed up in **Tinker v. Des Moines Community School District**, 393 U.S. 503, 506 (1969):

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."

This "school environment" obviously relates to the learning process, not the transportation process. For the basis for this "vigilant protection of constitutional freedoms" concerns the teaching or exchanging of ideas, or widening horizons or developing intellects.

Granting the necessity for protecting teachers in the environment of wide exposure to robust ideas from which truth may be ascertained, such considerations have no place in transporting pupils, and those driving the buses. Therefore, assuming that the findings in this case would protect a teacher from not being rehired, such should not be extended to bus drivers.

We do not argue that bus drivers are "relegated to a watered-down versions of constitutional rights." See **Garrity v. New Jersey**, 385 U.S. 493, 500 (1967). Instead, we insist that "because of these acknowledged distinctions of constitutional dimensions," **Healy v. James**, — U. S. —, 33 L. ed 2d 266, 291 (1972) Rehnquist opinion, the rule for teachers has not been and should not be bodily brought over to bus drivers, and applied to further curtail the right of control in local elected school boards.

II

The Court of Appeals has held that actively supporting a school boycott is a first amendment freedom of a bus driver.

The "boycott" found by the trial court to be actively supported by the bus driver was by all Negro pupils at the commencement of the school year 1967-68. The bus driver did not testify that she supported, actively or otherwise, the boycott. In fact, she testified that she did not know what it was about. The Record shows that the boycott was directed at the United States District Judge before whom a case for the desegregation of the system was then pending. The Record further shows that this disruption of the school in September, 1967, caused the Negroes who had exercised freedom of choice to elect to enter former all-white schools prior to the opening of the school year, to return to their former schools because this delay in entering school placed them at too great a disadvantage compared to the white pupils who started the school year on time.

In **Pickering**, this Court stated (391 U.S. 568):

> "* * * [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

This Court added that in "evaluating conflicting claims" the Court would consider whether the freedom exercised

> "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."

In **Healy v. James**, — U.S. —, 33 L. ed. 2d 266, 284 (1972),

> "In the context of the 'special characteristics of the school environment' * * * prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school'. * * * Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes or substantially interfere with the opportunity of other students to obtain an education."

In **Dunn v. Tyler Independent School District**, 460 F. 2d 460 (C. A. 5th 1972), a school regulation prohibiting boycotts was held valid since boycotts were in "inherent disruption of the classroom process."

Boycotts prohibit students from even attending school, and that was precisely what occurred at the beginning of the school year in Choctaw County in September, 1967. This boycott certainly interfered and interrupted classes, the regular operation of the schools generally, and the opportunity of the students to obtain an education. It blocked the integration of the schools for an entire year. Certainly the active support of this 1967 school boycott cannot be a First Amendment Freedom of tenured teachers in this school system. *A fortiori* active support of this school boycott cannot be a First Amendment Freedom of this non-tenured bus driver. But the Court of Appeals has held that the **Pickering** case compels the court to overrule the School Board for failing to rehire this bus driver. This, we submit, is in conflict with the law as laid down by this Court.

III

The Court of Appeals has held that discussion of segregation within the school with the FBI is a first amendment freedom of a bus driver.

As noted in **Pickering**, the right of free speech of teachers "commenting upon matters of public concern" is not absolute, it is to be balanced against the interest of the State as an employer. The claim that teachers' freedom to speak is absolute was refuted by Justice Black in his dissenting opinion in **Tinker v. Des Moines Community School District**, 393 U.S. 503, 521 (1969):

> "The truth is that a teacher of a kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression that an anti-Catholic and anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue."

One of the reasons **for** free speech for teachers is that ordinarily it will be informed, and therefore of benefit to the hearer as well as the speaker. Thus, in **Pickering** the speech by the teacher dealt with whether the school system needed additional tax funds, and, if so, how they should be allocated. In guaranteeing the teacher's freedom to speak on this, this Court said in **Pickering**:

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely **on such questions** without fear of retaliatory dismissal." (emphasis supplied.)

Hence, speech by teachers is protected because it is informed.

On the other hand, for this informed speech of teachers to be entitled to this protection, as stated in **Pickering**, it must not impede

> "the teacher's proper performance of his daily duties in the classroom or * * * [interfere] with regular operation of the school generally."

This is undoubtedly what this Court meant in **Healy v. James**, — U.S. —, 33 L.ed 2d 266, 284 (1972) stating that teacher's protected right to speak must be considered:

> "In the context of the 'special characteristics of the school environment' * * *."

Justice Rehnquist, at page 291, stated it:

> "First Amendment rights must always be applied 'in the light of the special characteristics of the * * * environment * * *,' * * *."

Therefore, the teacher's protected freedom to speak is not absolute; it is cherished because of its value to the hearer as well as the speaker. However, to be of value to the hearer, it must be relevant to the teacher's duties in the classroom, and to the operation of the school system generally.

If a teacher were to desert his position as teacher within the area of study for which he was engaged, his freedom of speech must be viewed in this context. Certainly such a teacher, outside his regular teaching duties, would not have a protected right to preach to his young pupils in the classroom pornography:

> **Ginsberg v. New York**, 390 U.S. 629, 634 (1968).

or violent:

> **Cox v. Louisiana**, 379 U.S. 536, 554 (1965);

See also: **Siegel v. Regents of U. of Cal.**, 308 F. Supp. 832 (Cal.D.C. 1971), Vac. 449 F. 2d 788 (C.A. 9th 1971).

In **Jones v. Hopper**, 410 F. 2d 1323 (C.A. 10th 1969), **cert. den.** 397 U.S. 991, the teacher ceased teaching his pupils in class what he was employed to teach and attacked policies of the school. This was beyond the Freedoms protected to prevent the teacher from being fired. Criticism of the school administration by a teacher was held not to be a First Amendment Freedom to speak by the Fifth Circuit, **Moore v. Winfield Board of Education**, 452 F.2d 726 (C.A. 5th 1971).

In **Goldwasser v. Brown**, 417 F. 2d 1169 (C.A. D.C. 1969), **cert. den.** 397 U.S. 922, a teacher of literacy went beyond this assignment and taught the pupils racism. It was held that **Pickering** did not protect this teacher in such deviation in the education process.

See also: **Ahern v. Board of Education**, 327 F. Supp. 1391 (Nebr. D. C. 1971), aff'd. 456 F. 2d 399 (C.A. 8th 1972).

Hence, had a classroom teacher sought to criticize the Transportation Supervisor for the way he repaired and maintained the school bus engine, neither **Pickering** nor any other case has extended First Amendment protection to such speech, unrelated to the teaching for which the teacher was engaged.

If a teacher has no such unlimited First Amendment right to speak on unrelated matters, *a fortiori* a school bus driver has no such right to speak on matters unrelated to her employment.

Therefore, the trial court and the Court of Appeals have grievously misread and misapplied the law in granting to a bus driver a protected right to discuss segregation in

the schools with anyone. She was hired to drive a bus; not make speeches about areas in the school system about which she could have only casual acquaintance.

IV

The Court of Appeals has held that in equity a school board is a "person" within the meaning of 42 U.S.C. § 1983, and therefore can be sued for torts of agents under respondeat superior notwithstanding the state rule to the contrary.

Had the Transportation Supervisor while driving a school bus run over the plaintiff, the School Board would not have been liable to plaintiff for this agent's tort, because respondeat superior does not apply to torts of public school agents in the operation of the school system.

Turk v. County Board of Education, 222 Ala. 176, 131 So. 436 (1930);

See also: **Hawkins v. State Board of Adjustment,** 242 Ala. 547, 7 So. 2d 775 (1942).

The trial court held in this case that the Transportation Supervisor illegally and wrongfully deprived this bus driver of constitutional rights. However, the School Board, the members of the Board, and the Superintendent

(1) Did not participate in any wrong to plaintiff;

(2) Did not even know of any such wrong;

(3) Did not ratify any known wrong;

(4) Were not even given an opportunity to review the matter, much less rectify any wrong;

(5) Were not benefitted in any legal sense as used with reference to private principals and agents.

Nevertheless, this wrong of the Transportation Supervisor is visited on the head of the School Board, and ultimately every school child in the system will be required to pay for this wrong of the Supervisor. Visiting the sins of the wicked employee on the head of the innocent public agency would not be allowed in Alabama.

See: **State v. Kolb**, 201 Ala. 439, 78 So. 817 (1918).

The decision implicit in this case is that the Civil Rights Acts, particularly 42 U.S.C. § 1983, overrides the common law rule in Alabama that respondeat superior does not apply to charge public agencies with wrongs of agents, and by reason of this Act, this School Board can be sued and compelled to respond in damages for the wrong to Plaintiff by the Transportation Supervisor. 42 U.S.C. § 1983 provides:

> "§ 1983. **Civil action for deprivation of rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This Court has held that where the State law does not apply vicarious liability to governmental bodies for wrongs of agents, this section does not extend liability to a city under respondeat superior for torts of its police, since the word "person" in the section does not embrace a municipal corporation.

Monroe v. Pape, 365 U. S. 167 (1961).

This was followed in the Chicago riot cases.

Yumich v. Colter, 452 F. 2d 59 (C.A. 7th, 1971).

In **Carter v. Carlson,** 447 F. 2d 358 (C.A.D.C. 1971), the rule that respondeat superior did apply to acts of the police was thought to change the meaning of "person" in § 1983. The reversal of that case by this Court in 34 L. ed.2d 613 (1973) does not pass on this point.

See also **Baker v. Washington,** 448 F. 2d 1200 (C.A. D.C. 1971).

Where there was some question about respondeat superior applying to torts of public servants in Mississippi, the question of whether or not § 1983 changed that rule was left open:

Roberts v. Williams, 456 F. 2d 819 (C.A. 5th, 1971).

The change of the State rule removing governmental immunity has not changed the meaning of who may be sued for damages under § 1983:

Yumich v. Colter, *supra*;
Moor v. Madigan, 458 F. 2d 1217 (C.A. 9th, 1972).

The construction of § 1983 in **Monroe v. Pape,** *supra*, that the statute does not apply to impose liability on a city for torts of police, has been extended to public school boards, and it has been held that the section does not make the board liable for the torts of school servants:

Corbean v. Xenia City Board of Education, 366 F. 2d 480 (C.A. 6th, 1966), **cert. den.** 385 U. S. 1041;

See also: **Avins v. Mangum,** 450 F. 2d 932 (C.A. 2nd, 1971).

The Fifth Circuit has now held that though "person" in § 1983 does not mean a school board in a court of law, in a court of equity, it does mean a "person" and therefore a school board may be sued under § 1983 in equity:

Harkless v. Sweeny Independent School District, 427 F. 2d 319 (1970).

This seems to create a conflict in the Circuits, for we read as holding precisely the opposite the case of

Cobb v. City of Malden, 202 F. 2d 701 (C.A. 1st, 1953).

We did not raise the question as to whether this School Board could be sued in this case under § 1983.

Cf. Tipton v. Board of Education, 276 Ala. 571, 165 So. 2d 120 (1964), where mandamus against the board was used to review the actions of the Tenure Commission.

What we do raise, and what we have insisted all along, is that the Board cannot be charged with the Transportation Supervisor's tort. The trial court held that § 1983 overrode this Alabama rule. We insist that this is a misconstruction of a Federal Statute which should not be allowed to stand.

In **Roberts v. Williams,** 456 F.2d 819, *supra*, it seems that this question was presented, but passed over by the Court of Appeals. It was raised by us in this case, and though not expressly written to, it had to be decided to render a judgment for damages sued for.

The question of whether or not § 1983 overrides the Alabama rule that respondeat superior does not apply to actions for the wrongs of a Transportation Supervisor, is squarely presented in this case. The Fifth Circuit held in this case that under § 1983 the School Board can be sued for the acts of this agent. This is not the proper construction or application of this Federal Statute and is a reason for granting the writ in this case.

V

The Court of Appeals may not deny full review to decisions of the District Court which strike down state action in the re-hiring of non-tenured school bus drivers.

Had the Alabama Legislature enacted a statute forbidding school boards to rehire school bus drivers who discuss racial segregation with the FBI and actively support school boycotts, a bill in equity to enjoin the application of such a statute to this Plaintiff on constitutional grounds would have to be heard by a three-judge court. In fact, it is not entirely clear that an injunction on these grounds against a resolution to this effect by the School Board could be heard by less than a three-judge court. The point is that state policy fixed by representatives elected by the people is not to be lightly overthrown by one-judge courts on constitutional grounds. But that is what has befallen this School Board.

We disclose no dark secrets of the administration of cases in the Fifth Circuit to call attention to the "responsible" judge on the screening panels, for the judges of that Court have disclosed these facts repeatedly in talks before Bar groups and others explaining the "system". The Judges of the Court are divided into screening panels of three-judges each. Appeals to that Court are referred to such panels. The Judges on the panel rotate responsibility for each appeal. The responsible judge makes the initial disposition of the appeal. To overturn this disposition takes affirmative action by the other two Judges.

It is to this system this appeal fell prey! By throwing this appeal onto the Summary Calendar, this School Board was denied the opportunity for oral argument which might well have ferreted out some of the doubts and confusion

in the minds of the judges. It certainly would have pointed out that there was not a scintilla of evidence in this case to sustain the findings by the trial judge, and there is a difference between firing and failing to rehire bus drivers.

Cooley v. Board of Education, 453 F. 2d 282, 286 (C.A. 8th 1972);

Ahern v. Board of Education, 456 F. 2d 399, 402 (C.A. 8th 1972).

Furthermore, had an opinion been written by one of three judges, the facts in the Record would have been reviewed, and had they been reviewed it would have been abundantly clear that there was not a scintilla of evidence to sustain the findings by the trial judge. The inapplicability of teacher cases to bus drivers would also have become obvious upon writing an opinion. Instead, the Court of Appeals told the School Board that the Board's defense to the charge of unconstitutional failure to rehire was so frivolous as to merit only summary treatment. School Boards are entitled to better treatment than Second Class judicial review. Judicial overruling of executive action violates the principle of separation of powers. Federal judicial overruling of State executive action violates intergovernmental relations. When both combine, the Federal courts must exercise restraint. To permit the Federal courts to strike down action of elected officials, is bad enough. To permit it to be done summarily is needlessly insulting and not called for by any known principle of jurisprudence. Neither this Court nor has Congress authorized such treatment of state action. Therefore, the summary disposition of this case is in conflict with the law, and this writ should be granted to rectify this error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted

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APPENDIX A

In the
United States Court of Appeals
For the Fifth Circuit

No. 71-2682

Summary Calendar*

Virginia Cole,

Plaintiff-Appellee,

versus

Choctaw County Board of Education,

Defendant-Appellant.

Appeal From the United States District Court for the Southern District of Alabama

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(January 5, 1973)

Before Thornberry, Coleman and Ingraham, Circuit Judges.

Per Curiam: We are in agreement with the well considered opinion of the district court, appended hereto, and its judgment is affirmed.

Affirmed.

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* Rule 18, 5 Cir.; See **Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.**, 5 Cir., 1970, 431 F.2d 409.

APPENDIX

Findings of Facts and Conclusions of Law

(Number and title omitted)

The above-styled cases having been heretofore consolidated for trial were tried before the Court sitting without a jury on March 3, 1971. After consideration of the evidence and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiffs, Virginia Cole and Frank Cottrell, were school bus drivers for the defendants, Choctaw County Board of Education. Neither have been re-employed since June 1968. Both are Negroes. Mrs. Cole had been driving a school bus in Choctaw County since 1948; Mr. Cottrell, since 1961.

2. Both plaintiffs contend they were not rehired because of their civil rights activity in Choctaw County, with particular reference to the school boycott in 1967.

3. Frank Cottrell was not rehired because he had many delinquent debts and his debtors frequently sought assistance from James H. Hutchinson, the supervisor of transportation, in collecting them. His debts gave rise to an incident on school grounds where he threatened another driver with a shotgun. While Mr. Cottrell may have been a civil rights activist, the sole reason for his discharge[1] was his indebtedness and the problems resulting therefrom.

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[1] Choctaw County bus drivers are employed each year on a one-school-year contract basis. Each bus driver employed in the preceding year is automatically rehired the next year after passing driving tests administered locally. Failure to rehire a driver is equivalent to discharging him.

4. Defendant contended at the trial that Mrs. Cole was not rehired for the following reasons:

(a) The location of her replacement's residence was closer to the beginning of the route and therefore saved several bus miles per day.

(b) There was some evidence Mrs. Cole had been siphoning gasoline from her bus.

(c) Mrs. Cole experienced considerable maintenance and mechanical problems with her 1948 Ford bus that the defendants considered caused by Mrs. Cole.

(d) Mrs. Cole developed an "uncooperative and negative attitude".

5. Mr. Hutchinson did not mention reasons (a) and (d) as reasons for discharging Mrs. Cole in his June 1970 deposition. Mr. Hutchinson prepared a typewritten list of drivers that he recommended the Board hire and Mrs. Cole's name was scratched out with pen and replaced with the name Herbie James, also with pen.

6. The Court finds that Mrs. Cole was discharged because she discussed racial segregation in Choctaw County Schools with the FBI and she had actively supported the 1967 school boycott. While the reasons in paragraph 4 above may be valid reasons to discharge a driver, these were not the reasons for which Mrs. Cole was discharged.

Conclusions of Law

1. The Court has jurisdiction of the subject matter under 28 U.S.C.A. § 1343 and 42 U.S.C.A. §§ 1981 and 1983.

2. The school board cannot discharge public employees as a penalty for exercising their First Amendment rights when such exercise is completely unrelated to and in no

way conflicts with the performance of his job. **Pickering v. Board of Education**, 391 U.S. 563 (1968); **Freeman v. Gould Special School District of Lincoln County, Arkansas**, 405 F.2d 1153 (1969), cert. denied 396 U. S. 843; **Battle v. Mulholland**, —— F.2d —— (5th Cir. March 23, 1971).

3. The Choctaw County Board of Education discharged Virginia Cole for constitutionally impermissible reasons. Accordingly, she is entitled to immediate reinstatement and back pay at the rate she would have been entitled to had she been continuously employed since 1968.

4. The Choctaw County Board of Education did not discharge Frank Cottrell for constitutionally impermissible reasons.

A judgment will be entered in accordance with the above findings of fact and conclusions of law.

Done at Mobile, Alabama, this the 29th day of April, 1971.

/s/ Daniel H. Thomas
United States District Judge

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 1972

No. 71-2682
Summary Calendar

D. C. Docket No. CA 5381-69-T

Virginia Cole,

Plaintiff-Appellee,

versus

Choctaw County Board of Education,

Defendant-Appellant.

Appeal From the United States District Court for the Southern District of Alabama

Before Thornberry, Coleman and Ingraham, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 5, 1973

Issued as Mandate: